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No. 09-992

In the Supreme Court of the United States

IBRAHIM PARLAK,

PETITIONER,

v.

ERIC H. HOLDER, JR.,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF OF PETITIONER

The government's opposition neither denies the importance of the question presented nor credibly disputes the existence of an eleven-circuit split over the application of the "ordinary remand rule" set out in *INS v. Ventura*, 537 U.S. 12 (2002), and *Gonzales v. Thomas*, 547 U.S. 183 (2006). Its entire effort at avoiding certiorari (or summary reversal) is premised on an untenable characterization of the Sixth Circuit's analysis. Notwithstanding the government's creative reconstruction of the decision below, the Sixth Circuit plainly identified the error in the legal standard applied by the BIA. But instead of remanding to permit the agency to apply the correct standard to the facts in the first instance, the court transparently undertook its own *de novo* inquiry. In at least seven circuits, however, Parlak's case would have been remanded to the BIA for application of the correct legal standard. Certiorari is warranted.

1. The government concedes that the Sixth Circuit should have remanded the case if the BIA applied the "incorrect legal standard." Opp.9. Its assertion that certiorari is not warranted because "the court of appeals found that the BIA applied the correct legal standard," *id.*, does not withstand scrutiny.

First, as the Sixth Circuit stated, the BIA "articulated the test as whether an individual 'furthers persecution in some way.'" App.18a. "*To be sure*," the Sixth Circuit stated, that articulation of the test "was vague and unhelpful." App.21a (emphasis added). As the Sixth Circuit explained, "the issue is *not* whether the person assists in *some* way; rather the analysis requires distinguishing between 'genuine assistance in persecution and inconsequential association with

persecutors.'" *Id.* (citation omitted) (first emphasis added); App.51a (Martin, J., dissenting) ("[W]e all agree that the Board's inquiry was incorrect.").

The government does not dispute this. It stresses instead that the Sixth Circuit found the BIA's articulation of the governing law "'vague and unhelpful *on its own.*'" Opp.12 (quoting App.21a). *But that was the BIA's only articulation of the governing standard.* This Court has repeatedly made clear that an agency's decision must be judged solely on the grounds invoked by the agency: "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see also Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[T]he function of the reviewing court ends when an error of law is laid bare.").

The governing law requires proof far beyond the BIA's fuzzy "'further[ing] persecution in some way'" standard. App.18a (citation omitted). Rather, the record must demonstrate an "*actual connection* between [petitioner's] actions and the persecution(s) in which []he is alleged to have assisted or otherwise participated." *Diaz-Zanatta v. Holder*, 558 F.3d 450, 459 (6th Cir. 2009) (emphasis added). The government's implicit argument that the BIA's standard was close enough is a nonstarter. As the petition (and the Sixth Circuit, for that matter) explained, the standards differ in kind and degree and will lead to disparate results in any number of cases—including this one. *See* Pet.18 (citing App.21a). The error here was no less legal error than a court

requiring only a possibility (rather than likelihood) of success on the merits for a preliminary injunction.

The government's fallback position is that regardless of the BIA's articulation of the law, the BIA actually "demanded evidence of genuine assistance." Opp.13. In other words, the government contends that if the BIA had understood the governing law, it still would have reached the same outcome. That is sheer guesswork. And as the Solicitor General has argued before, it is irrelevant too. Pet.20-21.

Second, the government finds solace in the Sixth Circuit's comment that "the BIA's analysis was consistent with *Fedorenko*." Pet.21a (citing *Fedorenko v. United States*, 449 U.S. 490 (1981)). But the government admits that *Fedorenko* merely "illuminate[s]" or "inform[s]" the actual governing standard to be applied. Opp.8, 9. Nearly thirty years ago, footnote 34 of *Fedorenko* suggested that whereas an individual who only cut inmates' hair prior to execution "cannot be found to have assisted in the persecution of civilians," a paid guard who shot at escaping inmates "fits within the statutory language." *Fedorenko*, 449 U.S. at 512 n.34. This Court observed that "[o]ther cases may present more difficult line-drawing problems but we need decide only this case." *Id.* And in the decades since *Fedorenko*, a more precise and searching test with "two distinct requirements ha[s] emerged." *Diaz-Zanatta*, 558 F.3d at 455; *see also* Pet.10 (collecting cases). First, "there must have been some nexus between the alien's actions and the persecution of others." *Diaz-Zanatta*, 558 F.3d at 455. "[S]econd, if such a nexus is shown, the alien must have acted with scienter ...." *Id.* This is not the test the BIA applied.

Despite intimations to the contrary, moreover, the government cannot seriously contend that amorphous "consistency" with the general aims of *Fedorenko*'s footnote 34 is sufficient. The government elsewhere has argued that scienter "is *not* required" under *Fedorenko*, *see Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 20-21 (1st Cir. 2007) (emphasis added), even though it clearly is under the governing standard here.[1] And the Sixth Circuit has previously condemned "the [agency]'s rote reliance on *Fedorenko*," and failure to apply the two-pronged test. *Diaz-Zanatta*, 558 F.3d at 459-60.[2] Here, the BIA neither invoked *Fedorenko* nor applied the two-pronged test.

2. The government asserts that the Sixth Circuit did "not engage[] in its own 'independent analysis' of the record," Opp.12 (quoting Pet.22), and "merely affirm[ed] findings expressly made by the BIA," *id.*

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[1] Contrary to the government's assertion, Parlak did not "agree[] that the *Fedorenko* standard governed," Opp.8 (citing App.20a n.9), nor did the Sixth Circuit ever so state. The court merely noted that the parties had described this Court's decision in *Negusie v. Holder*, 129 S. Ct. 1159 (2009), as "'not inconsistent with the application of *Fedorenko*.'" App.20a n.9 (citation omitted). Moreover, the Sixth Circuit expressly stated that "'the question of whether [Parlak] participated in persecution can be decided based on *existing circuit precedent*,'" App.20a (emphasis added) (citation omitted) (alteration in original), as distinct from this Court's decision in *Fedorenko*.

[2] The government also argues that because in a footnote in *Diaz-Zanatta* the Sixth Circuit cited *In re A-H-*, 23 I. & N. Dec. 774, 784 (A.G. 2005), the BIA's citation here to *In re A-H-* somehow indicates that the agency applied the proper persecutor bar standard in this case. Opp.12. But the BIA's sole use of *In re A-H-* was not to set out any nexus or knowledge tests, but merely to support the limited proposition that the persecutor bar does not require direct involvement in persecution. App.70a-71a.

(citing App.17a). But the Sixth Circuit's analysis under *Diaz-Zanatta* contains not one reference to the BIA's opinion. *See* App.21a-22a. And the Sixth Circuit's own language refutes the government's suggestion. After articulating the correct standard and conducting its own analysis, the court held: "*we find* that a nexus exists ... and that Parlak acted knowingly." App.22a (emphasis added).[3]

The government has no response. Instead, it persistently misattributes to the BIA findings and analysis conducted in the first instance by the Sixth Circuit. The government asserts, for example, that, "*As the court noted, the BIA found* that petitioner had provided money and weapons ... and had done so 'voluntarily and knowingly.'" Opp.8 (emphasis added) (quoting App.21a-22a). But the passage from which the government quotes is the Sixth Circuit's own findings and makes no reference to any findings of, or analysis by, the BIA. *See* App.22a. Similarly, the term "nexus" does not appear, either expressly or in concept, in the BIA's opinion, and appears in the Sixth Circuit's decision only in the court's own application of *Diaz-Zanatta*. App.21a-22a. Nevertheless, the government asserts that, "[a]s the court of appeals explained, the BIA in this case applied that 'nexus' standard." Opp.11 (citing App.21a).

Not only does the government misattribute to the BIA findings made by the Sixth Circuit, but it also

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[3] The government also stresses the Sixth Circuit's statement that "the BIA did not err in its legal analysis." App.23a. But that statement came only *after* the Sixth Circuit made its own findings and conclusions and is nothing more than the court's judgment that the agency reached what the court believed to be the correct legal *outcome*.

asserts facts that *neither* found when it claims that the agency and the court "found that petitioner had provided money and weapons to the PKK."[4] Opp.8 (citing App.21a-22a). Neither the Sixth Circuit nor the BIA concluded that any proceeds from the folk-dancing festivals Parlak helped organize ever made it from ERNK to the PKK. *See* App.32a-33a. Although the government conflates ERNK with the PKK, the Sixth Circuit recognized these organizations as distinct, *see* App.4a, 16a—hence the court's novel reliance on *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000), to bridge the substantial logical gap between the folk festivals in Germany and unspecified persecutory activities by the PKK in Turkey.[5] *See* Pet.18-20; National Immigrant Justice Center Amicus Br. at 10-12.

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[4] Though not relevant to the question presented, the brief in opposition also repeatedly mischaracterizes the facts about Parlak. As the district court noted in granting the habeas writ, Parlak is a "model immigrant" who "is not a threat to anyone." *Parlak v. Baker*, 374 F. Supp. 2d 551, 561 (E.D. Mich. 2005), *vacated as moot sub nom. Parlak v. U.S. Immigration & Customs Enforcement*, No. 05-2003, 2006 U.S. App. LEXIS 32285 (6th Cir. Apr. 27, 2006). And as Judge Martin noted in dissent from the Sixth Circuit's decision, "there is no evidence in the record that Parlak did anything 'to aid the PKK in committing violent acts.'" App.34a.

Nevertheless, the government represents that the BIA concluded Parlak "was in fact 'a fighter for the armed wing of the PKK.'" Opp.6 (quoting App.70a). That is false. A government witness—an agent who gave mere "profil[ing]" testimony and who had no direct knowledge of any of the facts—testified as much. App.17. But the BIA neither endorsed nor adopted that testimony as a fact. App.70a.

[5] As Judge Martin noted in dissent, the principle borrowed from *Humanitarian Law Project*—"[M]oney is fungible; giving support intended to aid an organization's peaceful activities frees

3. The government barely engages on the circuit split, largely relying on its claim that this case is not a proper vehicle to resolve any conflict. Opp.16. Beyond that, it cites three inapposite cases, none of which support its suggestion that the split is less than fully entrenched.

First, the government claims that the disparate outcomes between the circuits result from differences in facts and circumstances, rather than the circuits' adoption of conflicting interpretations of *Ventura* and *Thomas*. Opp.16-17. But it fails to refute *any* of the cases cited in the petition. In *Hussain v. Gonzales*, 477 F.3d 153 (4th Cir. 2007), for example, the court (along with a minority of circuits) held that *Ventura* and *Thomas* concern only "the appellate court's authority to review in the first instance *factual* issues not considered by the Board." *Id.* at 157. The dissent disagreed, echoing the view of seven circuits that *Ventura* and *Thomas* "involved factual and legal aspects" and required "not only ... the Board's review of evidence in the record, but ... the Board's application of the law to the facts. Such application of the law to the facts brings into play the Board's conferred

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up resources that can be used for terrorist acts," 205 F.3d at 1136, *cited in* App.22a—"is a far cry from requiring a causal connection with 'actual persecution' and knowledge or intent of such persecution, as the persecutor bar does." App.33a n.3.

Nor did the Sixth Circuit or the BIA conclude that any of the buried weapons ever reached the PKK. Indeed, as Judge Martin points out, "there is no evidence that the weapons [Parlak] supposedly carried into Turkey and buried there ever made it into the PKK's hands or were used by anyone." App.31a.

interpretative expertise in the field of immigration law." *Id.* at 160-61 (citations omitted).[6]

The government likewise has no response to the fact that the Second, Seventh, and Ninth Circuits previously limited application of the ordinary remand rule to cases where the agency had not considered factual issues, but now hold that "where the BIA applies the wrong legal standard to an applicant's claim, the appropriate relief ... is remand for reconsideration under the correct standard, not independent review of the evidence." *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006); *Matadin v. Mukasey*, 546 F.3d 85, 92 (2d Cir. 2008) (changing course and holding that it "may not enforce [an agency's] order by applying a legal standard the [agency] did not adopt" nor itself "engage in fact-finding under the appropriate legal standard") (internal

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[6] The government suggests that when the Fourth Circuit in *Li Fang Lin* remanded to the BIA the question of "what constitutes 'other resistance to a coercive population control program,'" *Li Fang Lin v. Mukasey*, 517 F.3d 685, 694 n.12 (4th Cir. 2008) (quoting 8 U.S.C. § 1101(a)(42)(B)), it backed away from the narrow interpretation of the ordinary remand rule it set out in *Hussain*. Opp.17. In fact, the court distinguished *Hussain* on the basis that the BIA's error in *Li Fang Lin* necessitated remand as to *factual* circumstances that "the BIA ha[d] not yet considered." 517 F.3d at 694 n.12; *id.* ("[W]e do not know what happened during Lin's IUD insertion because Lin was not allowed to testify about the IUD insertion procedure."). The Fourth Circuit's remand of that issue in *Li Fang Lin* is thus entirely consistent with its position in *Hussain*.

Likewise, the government's citation (at Opp.18) to *Retuta v. Holder*, 591 F.3d 1181, 1189 n.4 (9th Cir. 2010), does not undermine the conflict. There, the court declined to remand for resolution of a pure question of law that did not require application of the correct standard to the facts. *Id.*

quotation marks and citation omitted); *see also* Pet.26 (citing *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008)). Parlak's case plainly would have been remanded for reconsideration in these circuits, and the government does not disagree.

Indeed, the government's citation (at Opp.17) to *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006), illustrates precisely why certiorari is warranted. The Sixth Circuit has now shifted in the opposite direction from the Second, Seventh, and Ninth Circuits. *See also* App.52a (Martin, J., dissenting) ("[B]efore this case, it was the settled practice of [the Sixth Circuit] to remand when the Board or Immigration Judge apply the incorrect law."). Eleven circuits have spoken on the issue and are divided seven to four. In recent years, four circuits (moving in different directions) have changed sides of the conflict. The circuits are not moving towards reconciliation, and there is no reason to defer review.

4. Finally, the government does not dispute that no rare circumstances would justify an exception to the ordinary remand rule in this case. It also effectively concedes that summary reversal would be proper if the BIA applied the wrong legal standard.

CONCLUSION

The petition for certiorari should be granted and set for argument, or the decision summarily reversed.

Respectfully submitted,

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